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No. 84-505

In The

Supreme Court of the United States

October Term, 1984

DONALD E. PERCY, et al.,

Petitioners,

v.

CAMEO CONVALESCENT CENTER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. Is a denial of a right to receive referrals from state and county agencies, without an opportunity to be heard, a deprivation without due process, where postdeprivation state tort remedies may be available?

2. Was the trial court's failure to give a conspiracy instruction, where otherwise warranted, harmless error, rather than the prejudicial error as found by the Court of Appeals?

3. Did the due process clause of the Fourteenth Amendment entitle the respondent to notice and an opportunity to be heard prior to a denial of the right to receive referrals from state and county agencies?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners, Donald E. Percy, Darla C. Senn, Robert Durkin, Charles J. Fiss, Jr., Peggy Ann Smelser, Louis E. Remily, David L. Siegel, Thomas G. Van de Grift, Milton J. Stearns, Fran Richards, Kathleen Rubin, Nancy Kacynski and Janet Zanck.

Respondent, Cameo Convalescent Center, Inc., and in addition, plaintiffs, Dragomir Kresovic, Borislav Kresovic and Linda Hintz.

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STATEMENT OF THE CASE

Cameo Convalescent Center, Inc. (Cameo) is a family held corporation in Milwaukee, Wisconsin, whose primary business is operating a licensed nursing home.[1] Nursing

[1] Pursuant to Rule 28.1, Cameo asserts that it has no parent company, subsidiaries or affiliates.

homes are subject to extensive federal and state regulation and, in Wisconsin, the Wisconsin Department of Health and Social Services (WDHSS) monitors the compliance of nursing homes with these federal and state regulations. This action arose by virtue of certain enforcement actions taken by the WDHSS in 1978 and 1979.

On September 19, 1978, Darla Senn, a nurse-surveyor and employee of the WDHSS, together with another state surveyor, Nancy Kacynski, served thirty-four notices of violation (NOV's) upon Cameo. (Exs. 22 and 23) On October 17, 1978, the WDHSS imposed a plan of correction upon Cameo requiring that all these deficiencies be corrected within one day. (Ex. 47) Despite a timely appeal of both the NOV's and the imposed plans of correction, Cameo never received a hearing within the thirty-day period required under Wisconsin law (Exs. 36 and 54A) In fact, no hearing had been held prior to the time that Cameo was placed on the suspension of referrals list, as will later be discussed. (Resp. App. 12A)

On October 26, 1978, Kacynski conducted a verification visit to determine if Cameo had complied with the plans of correction for the three social services notices of violations. Kacynski found that all three of the alleged violations in the social services area had been corrected. (Ex. 54)

On January 2, 1979, another verification visit was conducted. Of the thirty-one violations alleged by Senn, twenty-four were found to have been corrected, acceptable progress was found to have been made with respect to four, and only three remained uncorrected. (L. 7-9)

From the outset Cameo had strongly opposed the issuance of the NOV's, contending that they were without

merit. (Exs. 36, 54A, 68, 96, 108 and 115) Cameo suggested that the NOV's had been issued in retaliation for comments Cameo had made to Wisconsin government representatives concerning what Cameo alleged to be the poor quality and biased nature of the annual nursing home surveys which the WDHSS conducted. (Ex. 108) At trial, Cameo proffered evidence that Senn, shortly after issuing the NOV's, told another surveyor "You know, I intend to screw them [Cameo]." (Ex. 327)

Other evidence which Cameo produced at trial showed that the other WDHSS defendants became increasingly aware that many of the NOV's issued by Senn were meritless, but the WDHSS continued to pursue them nonetheless. (Resp. App. 7A-9A) In a series of memos, one of the attorneys for WDHSS detailed the legal and factual deficiencies of these NOV's. (Resp. App. 1A-7A)

On March 21, 1979, Cameo was notified that it was being placed on the WDHSS' Suspension of Referrals list. (Resp. App. 10A-12A) The legal effect of placements of a home upon the SOR list is to preclude state and county social service agencies and departments from referring nursing home patients to that home. The SOR list is, in effect, a legally enforceable blacklist.

The Suspension of Referrals list (SOR list) was compiled by the WDHSS monthly and consisted of nursing homes with at least five outstanding uncorrected violations of the type served on Cameo. As of the time of the verification visit, Cameo was alleged to have had only three outstanding uncorrected NOV's. (Resp. App. 2A-3A)

Cameo's notice alleged that seven outstanding and uncorrected NOV's supported Cameo's placement on the list.

Fully five of the seven NOV's which were ostensibly responsible for Cameo's placement on the SOR list were identified as without reasonable merit by Siegel in his May 9, 1979 memo.[2] This information had been orally relayed to various other defendants responsible for compiling that list as early as late 1978 or early 1979. (Resp. App. 7A-9A)

Subsequently Cameo was also notified that it was being placed on the Suspension of Admissions list. (Ex. 160) The legal effect of being placed on the Suspension of Admissions list is to preclude the home from admitting any new patients whatsoever. That notification of placement on the Suspension of Admissions list was based upon a change in three findings from "corrected" to "uncorrected" by the original verification visit surveyor, Jane Preston, more than four months after the verification visit had taken place. (Ex. 135) Ms. Preston indicated that she was writing the memo to change her findings, "as instructed by D. Siegel."

All three of the NOV's, regarding which Jane Preston was instructed to change her findings, and which then formed the basis for Cameo being notified of its placement on the Suspension of Admissions list, were also identified by Siegel as without merit in that same memo.[3] In short, none of the defendants took action to dismiss the NOV's which were responsible for the sanctions imposed

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[2] Resp. App. 4A-7A. The five NOV's were nos. 111810, 111811, 111802, 111807 and 111809.

[3] Ex. 131, Resp. App. 4A-7A. These three NOV's were nos. 111805, 111806 and 111829. Of 111805 and 111806, Siegel says, "This citation is 100% unsupportable because of wholly inadequate investigation and flaky conclusions of law." Of 111829, he says, "So what?"

upon Cameo, even though it was known at an early date that they were without merit.

Wisconsin law provided that no nursing home could be placed on the SOR list unless it has been afforded the opportunity for a hearing prior to its placement on the list. Despite a timely appeal by Cameo of its placement on the list,[4] no hearing was ever held. Cameo's name appeared upon the April SOR list which was forwarded to over 600 social service departments and agencies. No copy of that SOR list, however, was ever sent to Cameo by WDHSS. (Exs. 308-310)

Subsequent to the publication of Cameo's name on the SOR list, one of the defendants sent an unsigned "memorandum" to at least one of the recipients of the SOR list indicating that Cameo had been placed on the SOR list "in error." (Pet. App. p. 104) Cameo introduced evidence tending to show that it was unlikely that at least certain of the defendants would have been unaware at the time the list was published that Cameo had appealed. (Resp. App. 16A-17A)

The statute, as well as the language of the list itself, however, provided that, once a facility was placed on the list, no referrals could be made to that facility until a subsequent list had been published and that facility had been listed in the "removal of restrictions" section. (Resp. App.

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[4] Petitioner contends that Cameo "was given the benefit of the doubt as to timeliness." (Petition for Writ at p. 16) In reality, there was never any doubt as to timeliness. Cameo had ten days after receipt of the notification of placement to file its appeal. It received the notice on March 21, 1979. (Resp. App. 10A-12A) On March 30, the ninth day after receipt, Cameo had hand-carried its appeal to the Department, filed it with the proper person, and had that person sign to acknowledge receipt of the document. (Pet. App. 71-73 and Resp. App. 13A-15A)

18A-20A) When the May SOR list was published, however, Cameo's name was not included in the "removal of restrictions" section. (Resp. App. 21A-22A) In fact, no official notification was ever given to the recipients of the list that Cameo had had its SOR restrictions removed.[5]

Ultimately, the NOV's issued by Senn were the subject of a stipulated settlement between Cameo and the WDHSS. (Ex. 256) Prior to that stipulation, however, Cameo had been required to defend itself in 18 days of administrative hearings. (R. 219, Tr. Vol. 1, p. 75) That stipulation provided for a dismissal of almost all of the NOV's and restrictions on the legal effect which could be given the remainder.

In 1979, other defendant surveyors issued additional NOV's against Cameo and WDHSS again imposed plans of correction. After Cameo appealed, and additional hearings were held, these NOV's were disposed of by stipulation in essentially the same fashion as those issued in 1978. (Ex. 275)

The Respondent and other plaintiffs filed this action alleging that, as a result of defendants' actions, they suffered substantial and direct economic losses, loss of business reputation and deprivations of their constitutional rights under the First, Ninth and Fourteenth Amendments of the Constitution. A bifurcated jury trial was held. At the conclusion of the liability phase of the trial, the jury found that Senn had acted with malice in preparing and prosecuting the NOV's against Cameo, and that the NOV's were prepared and prosecuted against Cameo for ulterior or improper motives. No other defendant was found liable.

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[5] The only recipient of the April SOR list whom the defendant established at trial had received even the unsigned memorandum of "retraction" was the Milwaukee County Department of Social Services.

The jury awarded Cameo compensatory damages of $65,000 and punitive damages of $10,000. Both Cameo and Senn appealed the trial court's subsequent judgment confirming the jury verdicts.

In its appeal, Cameo contended that the district court had made three errors which are relevant to the questions presented in this petition. First, Cameo contended that the trial court erred in refusing to provide the jury with Cameo's proffered instructions on conspiracy. The circuit court agreed. Secondly, Cameo contended that the district court erred in refusing to instruct the jury, as Cameo had requested, that Cameo was entitled to a due process hearing prior to its being placed on the SOR list. The circuit court agreed with this contention as well. Finally, Cameo argued that it was entitled to its proffered jury instruction that its rights would have been violated by reckless, as well as by intentional, conduct of the defendants. The circuit court also agreed with this contention. That court then remanded the case to the district court for a new trial with proper jury instructions on the plaintiff's theory of its case.

SUMMARY OF ARGUMENT

Certiorari should not be granted in this case because the reasons stated in the petition do not meet the standards set forth in Supreme Court Rule 17.

This Court's prior decision in *Logan v. Zimmerman Brush Company,* 455 U.S. 422 (1982) clearly held that the *Parratt v. Taylor,* 451 U.S. 527 (1981) exception to the predeprivation hearing is not applicable where, as here, the deprivation occurs during the course of a state procedure, rather than as a result of a random unauthorized tort by a state employee. Thus, the circuit court's decision was not in conflict with the decisions of this Court.

There is also no inconsistency among the circuit courts on how liability may be assessed on the basis of conspiracy. All circuits have held that conspiracy serves as a basis for assigning liability for a deprivation, it does not constitute a deprivation in and of itself. The circuit court so held in this case, and this Court need not exercise its discretion to grant the writ in order to resolve a conflict among the circuits.

It would also be inappropriate for this Court to grant the writ in order to address the petitioners' arguments that a corporation does not have a protected liberty interest under the Fourteenth Amendment, or that a predeprivation hearing was not constitutionally required, since neither of those arguments were raised prior to the filing of the petition.

Even if the Court were to look beyond the petitioners' prior waiver of these arguments, the petition shows no reason why these issues are significant federal questions requiring resolution by this Court. This Court has previously addressed the corporate liberty interest argument in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978) and resolved it in a manner consistent with the circuit court here. Similarly, the *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 264 (1981), *Fahey v. Mallonee,* 332 U.S. 245 (1947) and *Mathews v. Eldridge,* 424 U.S. 319 (1976) decisions, upon which the petitioner relies, are clearly distinguishable from the present case.

ARGUMENT

The factors which this Court will consider in determining whether to grant a petition for certiorari are contained in Rule 17. That section provides, in relevant part, that the Court will consider a petition for certiorari in the following circumstances:

"RULE 17. Considerations governing review on certiorari

* * * *

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

* * * *

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

* * * *

The petitioner proposes three issues for review by this Court. First, the petitioner argues that Cameo's denial of the right to receive referrals from state and county agencies without an opportunity to be heard, was not an unconstitutional deprivation since there were adequate state remedies available. Second, the petitioners argue that the trial court's failure to give a conspiracy instruction was only "harmless error." Finally, petitioners argue that the Fourteenth Amendment did not entitle Cameo to an adversary hearing prior to the denial of its right to receive referrals.

Petitioners do not argue that the circuit court's decision on these points conflicted with any decision of any other court of appeals or state court of last resort on a general principle of federal law. Nor does the petition argue that there are important questions of federal law presented which have not heretofore been decided.

While acknowledging that the failure to instruct on conspiracy was error, the petitioners argue that the specific facts of this case, as viewed by the petitioners, render that error "harmless." This is hardly the type of issue towards which this Court should direct its limited resources.

Thus, the sole questions presented for possible review by the petitioners is whether the circuit court's decision represents such departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision or whether the petition is from a decision, on a federal question, which is in conflict with the applicable decisions of this Court. We contend that the proceedings before the circuit court on the questions presented in the petition neither represent a departure from accepted practice nor are in conflict with any decision of this Court. It follows that the granting of a petition for certiorari to review these questions would be inappropriate.

I. THE CIRCUIT COURT'S DECISION IS NOT IN CONFLICT WITH HUDSON V. PALMER.

Petitioner argues that the circuit court's opinion directly conflicts with this Court's ruling in *Hudson v. Palmer,* 468 U.S. —, 82 L.Ed. 2d 393 (1984), a decision rendered subsequent to the opinion of the court of appeals in this case.

In *Hudson,* this Court extended *Parratt v. Taylor,* 451 U.S. 527 (1981) to cases involving intentional, as well as negligent, deprivations of protected interests. Thus, in certain circumstances, a postdeprivation remedy may not violate the due process clause, even if the deprivation is the result of intentional misconduct. However, this Court specifically acknowledged in *Hudson* that a postdepriva-

tion state remedy does *not* satisfy due process where the deprivation is effected pursuant to an established state procedure, as opposed to a random, unauthorized tort not related to an established state procedure. 82 L.Ed. 2d at p. 407.

In distinguishing between the two types of deprivations, the Court relied heavily upon its prior decision in *Logan v. Zimmerman Brush Company,* 455 U.S. 422 (1982). In *Logan,* this Court declined to extend the *Parratt v. Taylar* rationale to a situation where the interest involved was deprived pursuant to a state procedure. In so finding, this Court specifically held that:

> "This argument misses Parratt's point. In *Parratt,* the Court emphasized that it was dealing with 'a tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure.' 451 U.S., at 541, 68 L.Ed. 2d 420, 101 S. Ct. 1908. Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law. *Parratt* was not designed to reach such a situation." 455 U.S. at pp. 435-436.

The petitioner pointedly omits any reference to the *Logan* decision, even though that decision, and the reasoning of that decision, were specifically referred to and incorporated in *Hudson* on more than one occasion. The language of *Hudson* itself, for example, specifically notes that "postdeprivation remedies do not satisfy due process where a deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized action." 82 L.Ed. 2d at p. 407.

In the instant case, Cameo was not deprived of its protected interests through an unauthorized and random action by a miscreant state employee. Rather, Cameo's name was placed on the SOR list, a blacklist of nursing

homes, as part of an officially sanctioned enforcement procedure. This whole enforcement scheme was established by state statute. See, Wis. Stat. §50.04. Thus, the narrow exception created in *Parratt* and *Hudson* are simply inapplicable to this case. It follows that the circuit court's decision, not being in conflict with those cases, is not in need of review.

Even assuming *arguendo* that a good faith *Hudson v. Palmer,* or *Parratt* argument could be advanced, and we do not think that one could be, the factual question of whether the acts at issue in this proceeding were "random and unauthorized" has never been decided. Indeed, the petitioner never requested that such questions be submitted to the jury. Thus, this type of question seems more appropriately addressed to the jury on remand, than to this Court.

It logically follows that, since the circuit court's opinion was not in conflict with this Court's holdings, Rule 17 does not support the granting of certiorari on this basis.

II. THE CIRCUIT COURT'S DECISION WAS NOT INCONSISTENT WITH EITHER THIS COURT'S RULINGS OR RULINGS OF OTHER CIRCUIT COURTS ON THE ISSUE OF LIABILITY BASED ON CONSPIRACY.

The petition for certiorari appears to contend that this Court should grant certiorari because the circuit court's ruling, that the failure to give the conspiracy instruction was reversible error, conflicts with other decisions of both this Court and other circuit courts of appeal. For the reasons which follow, neither this Court's prior opinions nor opinions of other circuit courts are in conflict with the circuit court's holding in this case.

A. The Circuit Court's Ruling Does Not Conflict With Prior Decisions Of This Court.

The petitioner apparently argues that, because liability under 42 U.S.C. § 1983 is direct and personal, as opposed to vicarious, that no defendant could be found liable for the violation of Cameo's rights under a conspiracy theory, citing *Monell v Department of Social Services,* 436 U.S. 658 (1978) and *Rizzo v. Goode,* 423 U.S. 362 (1976). Those cases, however, relate solely to whether a municipality, or a supervisor, can be liable for the acts of an employee or subordinate where the municipality or the supervisor have had no involvement in, nor knowledge and approval of, the conduct of those employees or subordinates. Where the complaint alleges, or the facts show, that such a conspiracy existed, this Court has not hesitated to find such liability. See, for example, *Adickes v. S.H. Kress & Company,* 398 U.S. 144 (1970) and *Dennis v. Sparks,* 449 U.S. 24 (1980).

In *Dennis,* the plaintiff sought relief from a private individual who had allegedly conspired with a judge, through bribery and other corrupt means, to obtain an injunction which deprived the plaintiff of a property interest. While the Court found the judge to be absolutely immune from suit, it also found that an action could be maintained against the co-conspirators even though they had not themselves issued the injunction which caused the injury. Thus, the prior rulings of this Court are consistent with the circuit court's holding that liability will lie under a conspiracy theory, even when the individual defendant did not personally take the action which caused the legal harm to the plaintiff.

Thus, the circuit court's holding that the petitioners can be held liable for a deprivation of Cameo's protected

interest under a theory of conspiracy does not conflict with any prior holdings of this Court.

B. The Holding Of The Circuit Court Does Not Conflict With That Of Other Circuits On The Same Issue.

The petition contends that there is a division among the circuits on the question of whether a conspiracy, in and of itself, is sufficient to state a claim under 42 U.S.C. § 1983. It also contends that the circuit court below held conspiracy to constitute a separate actionable claim. Not only did the circuit court in this case not make such a finding, but there is no dispute on this issue among the circuits.

It is well settled that to give rise to a cause of action, a conspiracy must result in an overt illegal act. However, individual liability of the participants in that conspiracy arises from their participation or acquiesce in the common illegal scheme. Each individual participant in an unlawful conspiracy need not engage in the overt acts causing the injury in order to be liable. The circuit court below made explicit in *Hostrop v. Board of Junior College District No. 515,* 523 F.2d 569, cert. denied 425 U.S. 693 (7th Cir. 1975), that conspiracy extends liability to persons other than the actual wrongdoer.

> "The doctrine of civil conspiracy extends liability for a tort, here the deprivation of constitutional rights, *to persons other than the actual wrongdoer.* . . . 'The charge of conspiracy in a civil action is merely the string whereby the plaintiff seeks to tie together those who, acting in concert, *may be held responsible for any overt act or acts.*'
>
> '[*A*] *conspiracy may be used as the legal mechanism through which to impose liability on each and all the defendants without regard to the person doing the particular act.*'" 523 F.2d at p. 576. (Emphasis added)

But that circuit court has never held, and it did not hold in this case, that a conspiracy, without any other deprivation, is actionable under § 1983.

The petition cites two circuit court cases which, it contends, adhere to the view that conspiracy is actionable in and of itself. *Phillips v. Trello,* 502 F.2d 1000 (3rd Cir. 1974) and *Birnbaum v. Trussell,* 371 F.2d 672 (2nd Cir. 1966). In reality, neither of those two decisions have recognized such an independent actionable claim for conspiracy.

In *Phillips,* the circuit court reversed an order of the district court which dismissed the complaint of the plaintiffs for failure to state a cause of action under 42 U.S.C. § 1983. That complaint alleged, among other things, that the plaintiff had been "struck with a blackjack," was "taken to the police station, booked, placed in cells and held" and subjected to unreasonable searches of their residences. *Phillips v. Trello, supra,* at n. 2. The circuit court reversed the dismissal of the complaint, but in doing so, specifically based its decision on the fact that the complaint alleged a specific deprivation in addition to the allegation of conspiracy, stating that:

> "An action based upon § 1983 involves two distinct elements. First, *the plaintiff must assert a deprivation of rights,* privileges and immunities secured by the Constitution and laws." 502 F.2d at p. 1004. (Emphasis added)

At no point did that court state or infer that a conspiracy, without more, was actionable.

Similarly, in the *Birnbaum* case, the Second Circuit Court of Appeals reviewed a decision of the district court which dismissed a complaint which alleged that the defendant had conspired to have the plaintiff discharged from his position as an attending physician at a municipal

hospital. The court, in reversing that decision specifically held that "liability under the section must be based upon the 'deprivation of any rights, privileges or immunities secured by the Constitution and laws. . . .' " 371 F.2d at p. 676. It did not hold that a conspiracy, in and of itself, without any deprivation, would constitute an actionable claim under 42 U.S.C. § 1983.

Thus, the first prong of the petitioners' argument, that there is a conflict between the circuits on the applicable law as it relates to the liability created by conspiracy, is simply unfounded.

Moreover, the second prong of the petitioners' argument is equally ill-founded. For, the circuit court's opinion specifically recognizes that the plaintiffs, in order to prevail, will need to establish that the conspiracy actually resulted in the deprivation of a constitutionally protected interest, stating that:

> "The main thrust of plaintiffs' case was that the defendants had acted in concert to *deprive the plaintiffs of constitutionally protected rights.*" (Pet. App at p. 18) (Emphasis added)

In a subsequent portion of its opinion, the circuit court again emphasized that it was not basing its decision solely on the evidence of the existence of a conspiracy. Rather, in explaining its finding that the trial court's instruction on the due process rights of the plaintiff were erroneous, the court stated:

> "Cameo properly asserts a cognizable due process claim because Cameo's placement upon the SOR [Suspension of Referrals] list without the requisite hearing not only damaged Cameo's reputation but also altered Cameo's legal status. Cameo's placement upon the SOR list, like the individual placed on the list of known drunks in *Davis, deprived Cameo of a right* under state law: the right to receive referrals

from state social service departments and agencies." Pet. App. at pp. 31-32) (Emphasis added)

What the petitioners appear to contend is that since the jury could not identify the defendant(s) who was "personally and directly responsible for the placement of Cameo on the suspension of referrals list *and* acted with intentional or reckless disregard of Cameo's right to appeal [as opposed to Cameo's right to a *hearing* prior to] such placement," that therefore Cameo must not have been deprived of a protected interest. However, it is undisputed that Cameo *was* placed on the SOR list without a hearing. The jury did not find, because it was not asked to find, that there was no conspiracy which, as a result of the combined actions of the defendants, resulted in Cameo's wrongful placement on the suspension of referrals list. This Court has previously cautioned against courts of appeal imposing their own views on the meaning of ambiguous jury responses to special verdict questions so as to extinguish causes of action. *Gallick v. Baltimore & Ohio Railway Company*, 372 U.S. 108, 119-120 (1963).

Thus, since the circuit court did not hold that conspiracy alone is sufficient to establish liability under § 1983, there is simply no basis for this Court to exercise its discretion by certiorari on this basis.

III. THE CIRCUIT COURT'S DECISION DID NOT CONFLICT WITH THIS COURT'S PRIOR DECISIONS ON THE QUESTION OF WHETHER CAMEO WAS ENTITLED TO A PREDEPRIVATION HEARING.

The petition for certiorari argues that the decision of the circuit court is in conflict with prior decisions of this Court on the question of whether or not Cameo was entitled to a predeprivation hearing before it was placed on the suspension of referrals list. The petition advances two independent arguments in support of this position.

First, the petition argues that a corporation does not have a recognizable liberty interest so as to trigger the constitutional right of due process. Secondly, the petition argues that the State's interest in the publication of the suspension of referrals list outweighed Cameo's interest in not being placed erroneously on the SOR list, and thus a predeprivation hearing was not required.

A. The Arguments Advanced By The Petitioners Were Not Previously Raised.

Both of the petitioners' above arguments do have one thing in common. Neither of them was raised by the petitioner prior to the filing of the petition for certiorari in this Court. In fact, in arguing that there was no reversible error in the district court's refusal to instruct the jury that Cameo was entitled to a predeprivation hearing, petitioner affirmatively contended before the court of appeals that such an instruction was unnecessary *because it was undisputed that Cameo had not received the hearing to which it was entitled.* (Pet. App. pp. 33-34)

Under this Court's prior holding in *Ellis v. Dixon,* 349 U.S. 458, rehearing denied 350 U.S. 855 (1955), issues not previously raised are not properly reviewable by certiorari. This holding is clearly consistent with the language of Rule 17. For, if the issue was never presented below, there cannot be a circuit court's decision on that issue which would be in conflict with other applicable court rulings.

The petitioners' belated advancement of its "liberty interest" argument is a particularly egregious violation of the *Ellis* rule. For, not only have petitioners not previously raised that issue, but their own proposed jury instructions on the due process question would have allowed the jury to find liability on the basis of the infringement

of Cameo's liberty interest. (Resp. App. 22A-25A) Similarly, the petitioners never requested any jury instruction, nor introduced any evidence, which would have allowed the jury to infer that the State's interest in publication of the SOR list was of such magnitude so as to trigger an exception to the normal predeprivation hearing requirement. Therefore, we believe that it would be inappropriate for the Court to consider these issues for the first time by petition for certiorari.

B. The Circuit Court's Decision Does Not Conflict With This Court's Prior Holdings On Corporate Liberty Interests.

The petition argues that the Seventh Circuit Court of Appeals should have dismissed the complaint, on its own motion, because a corporation does not have a liberty interest protectable by the due process clause, citing two substantive due process cases, *Western Turf Association v. Greenberg,* 204 U.S. 359, 363 (1907) and *Northwestern National Life Insurance Company v. Riggs,* 203 U.S. 243, 255 (1906). The petition fails to cite, however, this Court's much more recent opinion in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978). See also, *Newport v. Fact Concerts, Inc.,* 453 U.S. 247 (1981) in which this Court set aside a punitive damage award against a municipality, but left otherwise standing the judgment in favor of a corporation on the basis that its similar liberty interests had been deprived. *Fact Concerts, Inc. v. City of Newport,* 626 F.2d 1060, 1063 (1st Cir. 1980).

Even assuming that petitioners' liberty interest question was properly presented, the circuit court's decision is not in conflict with applicable rulings of this Court. In order to have a viable argument, petitioners would need to establish two points, that the interest asserted by Cameo is strictly a liberty interest and that the *Western Turf* and

Northwestern National Life cases govern the facts of this case. Petitioners cite no holdings of this Court which limit Cameo's interest involved solely to the concept of a "liberty interest." See, for example, *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), holding that business goodwill is a *property* interest recognizable under the due process clause. Thus, the petition fails to meet even the first prong of the test. The district court in this case specifically found that Cameo's interest in receiving patients was a property, not a liberty, interest under Wisconsin law. (Cross-Pet. App. 2A)

In the *Bellotti* case, this Court held that a corporation had a recognizable liberty interest, under the First and Fourteenth Amendments to the U.S. Constitution, to contribute corporate funds to political campaigns. The Supreme Judicial Court of Massachusetts had upheld a statute barring such contributions in certain circumstances on the grounds that corporations have more limited liberty interests under the Fourteenth Amendment than do natural persons. In reversing that decision, this Court made it clear that it was doing so on the basis of its view of an expanded corporate liberty interest under the Fourteenth Amendment, stating that:

> "Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the *liberty* safeguarded by the Due Process Clause, . . . [a]nd the Court has not identified a separate source for the right when it has been asserted by corporations." 435 U.S. at p. 780. (Emphasis added)

In a subsequent footnote, the Court clearly notes that:

> "It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment. *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394, 30 L.Ed. 118, 6 S. Ct.

1132 (1886); see *Covington & Lexington Turnpike R. Co. v. Sandford,* 164 U.S. 578, 41 L.Ed. 560, 17 S. Ct 198 (1896)." 435 U.S. at p. 720 n. 15.

Thus, even assuming arguendo the applicability of the *Northwestern National Life* and *Western Turf Association* decisions to a *procedural* due process claim, the force of those decisions has been seriously eroded by this Court's more recent opinion in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978).

Justice Rehnquist, in his dissent in *Bellotti,* clearly recognized the effect of that decision on the *Northwestern National Life* line of cases. 435 U.S. at p. 822. However, even under the test proposed by Justice Rehnquist, Cameo's interest in not having referrals suspended is a protected interest under the due process clause.

That proposed test in a functional analysis in which the Court determines which liberty interests are "incidental to the corporations existence," and then affords protection to only those interests. 435 U.S. at pp. 823-824. Here, of course, the right to receive referrals of nursing home patients can hardly be said not to be an interest incidental to a corporation which is chartered and licensed to operate as a nursing home. Thus, Cameo would have a protected liberty interest in remaining off of the SOR list even under the functional-analysis test.

Thus, under the existing state of the law as enumerated by this Court in *Bellotti,* corporations do retain liberty interests protected by the due process clause and Cameo's asserted interest was protected by the due process clause.

Even assuming *arguendo,* however, the continued and undiminished vitality of *Northwestern National Life* and

Western Turf Association, those early decisions do not justify a review of the decision rendered by the Seventh Circuit Court of Appeals in this case. First of all, those decisions were both based upon substantive due process claims which challenged the general regulation of certain business practices by state legislatures. This case, on the other hand, alleges a *procedural* due process claim challenging individualized action by state officials against a specific business corporation. Because of the original reasoning upon which the Supreme Court decided *Northwestern National Life,* the seminal case, this distinction is clearly a determinative one.

In *Northwestern National Life,* an insurance company challenged a Missouri statute of general applicability which precluded insurance companies from raising a specific affirmative defense in defense of a life insurance policy claim. The company alleged, in part, that its right to raise this defense was a liberty interest protected by the Fourteenth Amendment. Justice Harlan, in writing for the majority, analyzed the relationship of the corporation to the state legislature which had adopted the statute. He reasoned that, since the state had created the corporation, and could abolish it altogether, "the state could make such a regulation in relation to its own corporations; for a corporation cannot exert any power, nor make any contract, forbidden by the law of its being." 203 U.S. at p. 254.

In short, the Court based its finding on its perception that, since the corporation only existed by virtue of state law, it could not challenge the will of the state legislature, which was solely responsible for its very existence. The *Western Turf Association v. Greenber* case, also authored

by Justice Harlan, merely adopted, without comment, the holding in *Northwestern National Life.*

The present case, on the other hand, is clearly distinguishable from these two cases. Wisconsin law, the applicable body of law to determine the corporate existence and status here, recognizes a clear distinction between the ability of a "creature of the legislature" to challenge legislative action, and its ability to challenge actions by state officials which are in excess of their statutory authority. Thus, entities created by the legislature are precluded from challenging the constitutionality of a state statute, but they may challenge agency action in excess of the agency's authority. See, for example, *Brown County v. Department of Health and Social Services,* 103 Wis. 2d 37, 307 N.W.2d 247 (1981) and *County of Dane v. Department of Health & Social Services,* 79 Wis. 2d 323, 255 N.W.2d 539 (1977).

Both of those state cases involved a determination of whether or not a county, a municipal corporation which is clearly a creature of the state, and therefore lacking standing to challenge the validity of any state statute, had standing to challenge agency actions which were alleged to be in excess of its authority.

In analyzing the questions presented, the Wisconsin Supreme Court clearly distinguished between those instances where the creature of the state challenged the will of the legislature, and those situations where the claim was not made against the "creator" of the entity involved. In concluding that counties were not precluded from initiating court action to challenge the validity of

state agency action in excess of agency authority, the court concluded that:

> "If administrative agencies may legitimately act only within the bounds of their delegated authority, then to charge an agency with exceeding that authority is not to question the propriety of legislative action but, as we said in *Dane County,* 'to vindicat[e] legislative requirements.' 79 Wis. 2d at 332, 255 N.W.2d, at 539." *Brown County v. Department of Health and Social Services,* 307 N.W.2d at p. 251.

These two earlier decisions by this Court have no applicability to the action here, which challenges agency and official conduct not authorized by the state legislature, rather than challenging the validity of state statutes. Therefore, because the *Northwestern National Life Insurance Company* and *Western Turf Association* cases are clearly distinguishable, and because they have been subsequently modified by the *Bellotti* case, the circuit court's decision is not in conflict with the holdings of this Court. It follows that certiorari would be inappropriate on this basis as well.

C. The Petitioners' Actions Do Not Fall Within The Emergency Exception To The Predeprivation Hearing Requirement.

The petitioners' assertion that a predeprivation hearing was not required, even if that argument had been timely made, would not justify the exercise of certiorari for at least two reasons. First of all, two of the cases of this Court upon which the petitioners primarily rely, *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 264 (1981) and *Fahey v. Mallonee,* 332 U.S. 245 (1947), both involved challenges to statutory regulatory schemes on the grounds that these enactments violated

due process on their face. In both cases the legislation challenged provided for temporary summary action if certain standards were met. Prompt postdeprivation hearings were specifically required to be provided within a short time thereafter.

Because both challenges were to statutory enactments, the Court in each case was able to point to a specific legislative determination that the action to be taken was required to be done immediately in order to adequately protect public health or safety. The Court was thus able to review that legislative determination to see if it was rationally supported. The Court determined, in both of those cases, that the legislative concern was rationally based and upheld the facial constitutionality of the laws.

In the present case, on the other hand, the state legislature has made no such determination. In fact, to the extent that the state legislature has made a determination on the need for swift action at all, it makes that determination contrary to the position the petitioners' assert. For, the state statute at issue here clearly provides that parties are not to be placed on the suspension of referrals list until *after* they have received an evidentiary hearing on the propriety of such placement. Thus, there is simply no finding, legislative or otherwise, that a public interest in health or safety existed, and which would have justified departure from the usual rule that a due process hearing is to be accorded *before* the deprivation occurs. See, *Boddie v. Connecticut*, 401 U.S. 371 (1971) and *Logan v. Zimmerman Brush Company, supra.*

This Court has upheld summary deprivations in individual cases only in those special circumstances in which

the statute involved provided for a prompt postdeprivation hearing and where that hearing would provide adequate compensation to the aggrieved party for an erroneous deprivation. *Barry v. Barchi,* 443 U.S. 55 (1979) and *Stoehr v. Wallace,* 255 U.S. 239, 246-247 (1921). Here, of course, the statute provides only for a predeprivation hearing, it does not provide for a postdeprivation hearing at all. No time limits are specified for a postdeprivation hearing on an erroneous placement, and there is no administrative procedure by which the interests destroyed by publication on the SOR list will be adequately compensated. Nor does the availability of state tort remedies satisfy this requirement, *Logan v. Zimmerman Brush Company, supra.* Thus, petitioner's reliance upon the balancing test set forth in *Mathews v. Eldridge,* 424 U.S. 319 (1976) is also misplaced.

The petition therefore fails to state a valid reason for review on this basis as well.

CONCLUSION

For the above reasons, we respectfully submit that the petition for certiorari should be denied.

Dated this 25th day of October, 1984.

Respectfully submitted,

ROBERT M. HESSLINK, JR.
Attorney for Respondent

121 South Pinckney Street
P.O. Box 2509
Madison, WI 53701
(608) 255-8891

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APPENDIX

[Date:] April 18, 1979

[To:] File

[From:] David Siegel
Attorney
Bureau of Quality Compliance

[Subject:] Cameo Convalescent Center—Darla Senn

The Cameo debacle has taken place in the following sequence of events:

1. On September 22, 1978, Robert Hesslink, Attorney for Cameo demanded Darla Senn's survey notes. Mrs. Senn refused to produce those notes.

2. By telephone, I requested that Darla Senn send me the Notices of Violation and a list of all her evidence for each NOV. She sent the NOV's, but refused to send the evidentiary material. Repeated requests to Darla for her information was to no avail.

3. Only upon written directive from Charles Fiss, did Mrs. Senn reluctantly respond with the materials.

4. On October 31, 1978, Mrs. Senn protested our release of her notes and requested "participative withdrawal" from the case. As best as I can tell, "participative withdrawal" is a Roman Catholic birth control technique. Although I didn't know that Mrs. Senn was Catholic, she of course may use whatever method that she feels appropriate.

5. Mrs. Senn continued to be uncooperative and difficult until she was served with a subpoena to produce a tape recording on or about March 1, 1979.

6. Although Mrs. Senn is now cooperative to the extent of preparing the case, she is insistent on trying this case in her own way, and is most difficult to deal with. Her evidence is often flaky and her investigation has proven to be highly inadequate. For example, she asked that I subpoena certain materials to the hear-

ing so that she could find information. It is obvious that the hearing is no time to conduct a survey investigation.

7. Jane Preston, who conducted the verification visit, has considerable disagreement with Mrs. Senn's survey findings, although she is somewhat reluctant to directly contradict her.

DS:kk 754906
cc: Fran Richards
Darla Senn

(Exhibit 138)

———o———

TESTIMONY OF BORISLAV KRESOVIC—DIRECT EXAMINATION BY MR. HANDZEL:

Q. Did you have a conference with Miss Preston regarding the results of her findings during the verification visit?

A. Yes, I did. I had a meeting with her.

Q. Who was present during that conference?

A. For most of the time Mrs. MacDonald was present when she conveyed to us that she found everything corrected except four NOVs that had substantially or acceptable progress of correction and three she marked as uncorrected. She conveyed this to me. I asked her if I may have a copy of her half portion sheet of her verification visit with her comments so that I could convey it to the administrator as to what is not corrected, and Mrs. MacDonald took notes for the other corrected ones or acceptable progress ones. There were a total of seven that she found. Four she marked acceptable progress being made. Three

she marked as uncorrected. The rest were marked as all corrected.

Q. What is your understanding as to what a rating of acceptable progress means?

A. My understanding is that you have almost corrected it or it should be considered a corrected deficiency or NOV.

Q. In addition to advising you of the status of violations during that verification visit, did Mrs. Preston say anything else?

A. Yes.

Q. What did she say?

A. She looked at the NOVs and she said, "Why did she do this to you?"

R. 219, pp. 56-57.

———o———

[Date:] April 18, 1979

[To:] File

[From:] David L. Siegel
Attorney
Bureau of Quality Compliance

[Subject:] Session with Darla Senn and Fran Richards Regarding Cameo Hearing.

On April 16, 1979, Delores Kester and I met with Darla Senn to prepare for the Cameo hearing. The session was once again exasperating because of the difficulty in communicating with Mrs. Senn about the inadequacy of many of her citations.

• • • •

Tickets for this hearing are now available at my desk. Groups of ten or more will receive a 15% discount. Mail

orders will be accepted with a stamped, self-addressed envelope. Tickets will sell for $2.50 per day or $15.00 for the entire hearing. Door prizes will be given to the most imaginative costume worn to hearing. In addition, wager will be taken as to who gets murdered first, on what day, and at what time of day. All are welcome! It should be a gala event!

DLS: to 137267

(Exhibit 137)

———o———

CORRESPONDENCE/MEMORANDUM

STATE OF WISCONSIN

Date: May 9, 1979

To: File

From: David L. Siegel
Attorney
Bureau of Quality Compliance

Subject: Cameo Convalescent Center Hearing

The following is a summary and critique of the Notices of Violation drafted and served by Darla Senn on Cameo Convalescent Center, Inc.

NOV #111728: (Policy on medical direction)—This citation is based on a rather "liberal" interpretation of a rather vague H 32 rule. Since the facility has a book of various policies, it is rather doubtful that we can substantiate that a "policy" on medical direction is explicitily required.

NOV #111729: (Discharge summaries)—If the facility does not bring forth evidence that the missing discharge summaries in fact were in the files, this NOV is rather clear.

NOV #111730: (Thirty days doctor visits)—This citation is well substantiated.

NOV #111801: (Levels of care)—This citation is based on Darla's findings that the level of care box on the PPOC

form had not always been checked. The boxes are presently checked, but they may have been filled in later. Darla did not follow-up with interviews of staff at Cameo.

NOV #111802: (Podiatry documentation)—Although the podiatrist is not charting very well, the selection of rules cited here are inappropriate.

NOV #111804: (Nurses meetings)—I am not sure what we've got here.

NOV #111805: (Staffing deficiency)—Although the facility meets minimum staffing, Darla cited them for insufficient staff because they don't meet their "master staffing plan," which was provided orally to Darla by the Director of Nursing. Darla also contends that the insufficient staff is proven by such "examples" as a nurse call cord which was out of place. This citation is 100% unsupportable because of a wholly inadequate investigation and flaky conclusions of law.

NOV #111806: See 111805.

NOV #111807: (Procedure Manual)—Again, this H 32 rule is vague, and does not specify exactly what must be provided in the way of procedures. I doubt whether a procedure "on proper apparel and dressing a resident" is required as Darla indicates.

NOV #111810: (Rehabilitative nursing—Class "B")—Darla concluded that Cameo lacked a rehabilitative nursing program because of three observations: (1) The fact that approximately one third of the residents in Cameo had a Foley catheter installed; without investigating the specific needs of each of those patients, Darla jumped to the conclusion that not enough was being done to remove these people from catheters; (2) the fact that several patients had been observed as not being turned according to the posted schedules—again Darla did not follow-up her observation to find out any good reason for the positioning of the patients; (3) the fact that several female patients were dressed in clothing that was put on back-

wards. In general, this citation represents a leap of the imagination based on information that warranted further investigation. Unfortunately no further investigation had been conducted.

NOV #111811: (Bed rest without order—Class "B")—Chart review revealed several patients who had been in bed for entire shifts without a doctor's order. I believe this finding warranted further investigation to discover whether there had been good reason for this bed rest. No such investigation had been conducted.

NOV #111817: (Medicine room temperature)—Darla entered the medication room, asked the Director of Nursing what the temperature was, and noted down what the DON told her. At no time did Darla measure the temperature herself. This method of investigation is amateurish and unacceptable, based entirely on heresay [sic] and no substantiation of the accuracy of the thermometer.

NOV #111823: (Inadequate supply of restraints)—Darla observed several residents were restrained with bed linen, rather than commercially manufactured restraints. She then jumped to the conclusion that the facility had an inadequate supply of restraints. It now appears that, in fact, Cameo had plenty of commercial restraints. They simply chose to use bed linen in some instances. Whether use of bed linen as restraints is acceptable or not, citing the facility for an inadequate supply of restraints in [sic] nonsensical.

NOV #111829: (ID sheet lacking minister's name)—Cameo was cited because several patients did not have the name of a clergyman noted on their ID sheets, but only had the name and number of a church. So what?

NOV #111813, 111819, 111820: (Handling of drug orders and profiles by the pharmacist)—Darla telephoned the contracted pharmacy from Cameo and spoke to an unidentified female voice at the pharmacy. Based on her conversation with this anonymous voice, Darla cited several violations. It is bad enough that she did not observe these problems herself. It is wholly incredible that she did not even ask this person what her name was. This "method" of investigation is again amateurish and ludicrous.

The rest of the Notices of violation appear to be more sustainable, as they are based on documented clinical charts maintained by Cameo. However, I fully expect to be surprised by information brought forth at hearing that should have been exchanged at the exit interview or before. Why all this time has to be wasted to do what should have been done six months ago is beyond me.

DLS/jh 651108 (Exhibit 150)

———o———

TESTIMONY OF DEPOSITION OF THOMAS VAN DE GRIFT TAKEN AUGUST 2, 1982—MR. HANDZEL READING FROM QUESTIONS POSTED BY MR. HESSLINK:

* * * *

Q. And, Mr. Siegel ever communicated to you in anyway his belief that a significant number of the Notices of Violation which were issued by Darla Senn in 1978 could not be substantiated?

A. He communicated to me on several occasions that a number—I wouldn't use the word "significant" but a number of the Notices of Violation he had some evidentiary problems with.

Q. When is the first time he communicated to you that there was some problem with the Notices of Violation?

A. I am not certain of the date. It would have to be the end—somewhere around the end of 1978, early part of 1979.

* * * *

Q. Was this one of the things in 1978 or '79 he expressed some concern which would have been consistent with his statement here, "This citation is a hundred percent unsupportable because of a wholly inadequate investigation and flakey conclusions of law" closed quote?

A. Yes.

Q. He expressed that fairly early on in 1979?

A. Yes.

Q. Would it be fair to say that Exhibit No. 150, although you may not have seen that document, is a record of statements, a memo for the file of statements which he probably had properly made to you and others regarding these Notices of Violation?

A. Yes.

Q. What authority did you have at the end of 1978, early part of 1979, when Mr. Siegel was informing as to the problems about a number of these NOVs, what authority did you have yourself to make a decision, to dismiss particular Notices of Violation?

A. None.

Q. Who had the authority to make that decision?

A. Chuck Fiss, or up the ladder up the ladder.

* * * *

Q. Well, did you express a belief in these conversations that one or more of these Notices of Violations were invalid?

A. What I expressed, the nature of our problem with the NOVs that Darla had done an inadequate job of investigating. She had poor investigative techniques and that the fact that she had did not support the violation.

Q. In other words, that there was insufficient evidence to support the violation?

A. Correct.

Q. Did you relay that information to other persons within the Bureau of Quality Compliance prior to June 11, 1979?

A. Yes.

Q. And, you would have relayed information to Mr. Fiss?

A. At some point, yes.

R. 214, pp. 45-47, 52.

———o———

TESTIMONY FROM DEPOSITION OF LOUIS E. REMILY TAKEN AUGUST 5, 1982 BY MR. HANDZEL:

Q. Were you ever advised that many of the violations, Notices of Violation were unsupportable?

A. Yes.

Q. By whom?

A. One of the exhibits was a memorandum from David Siegel to the file which indicated lack of support for a number of violations.

Q. You had seen that memo previously?

A. Yes.

Q. Prior to today?

A. Yes.

Q. When?

A. I would assume shortly after it was written.

R. 215, p. 260.

———o———

NOTICE OF PLACEMENT ON THE SUSPENSION OF REFERRALS LIST

March 19, 1979

Dragomir Kresovic,
Administrator
Cameo Convalescent Center
5790 South 27th Street
Milwaukee, WI 53221

IMPORTANT NOTICE:
READ CAREFULLY
Please note that if you wish to contest placement of your facility on the list by the Department, you must send a hearing request to the Department within the 10-day limit, even if you have already requested a hearing on other issues, such as the violation itself.

Dear Mr. Kresovic:

This is to inform you that, beginning in April, 1979, your nursing home will appear on the Suspension of Referrals List, pursuant to § 50.04(4)(d), Wisconsin Statutes. Your facility's placement on the Suspension of Referrals List is based on the existing violations, enumerated by Notice of Violation serial number, which are listed on page two of this letter.

While your facility is on the Suspension of Referrals List, county agencies are prohibited by law from making referrals to you, under § 50.04(4)(d)(1), Wisconsin Statutes. This restriction takes effect upon publication of the list, and will continue until the department notifies your facility and the county agencies in writing that your facility has been removed from the Suspension of Referrals List.

Your facility is entitiled to contest placement on the list. If you wish to contest this action, as provided in § 50.04(4)(d), you must request a hearing in writing

within ten days of receipt of this notice, by a letter sent to:

Enforcement Section—*Appeals*
1 West Wilson Street, room 421
Madison, Wisconsin 53702

For your own protection, any such appeal should be sent by certified mail.

If you have questions concerning this action by the Department, you may call Enforcement Administration at (608) 266-1258.

Sincerely yours,

/s/ Charles J. Fiss, Jr., Director
Bureau of Quality Compliance

Envelope Postmarked
March 20, 1979
Certified Mail PO 24470016

RECEIVED
March 21, 1979
Cameo Conv. Ctr., Inc.

NOTICE OF PLACEMENT ON THE SUSPENSION OF REFERRAL LIST

Cameo Convalescent Center #2230
March 19, 1979 Page 2

The placement of your facility on the Suspension of Referrals List is based on the following existing violations, enumerated by Notice of Violation serial number:

Violation #	Class	Reason*	Violation #	Class	Reason*
111730	B	2	111807	C	2
111810	B	2	111809	C	3
111811	B	2	111822	C	3
111802	C	3			

*KEY: REASONS FOR COUNTING LISTED VIOLATIONS

1. The plan of correction for this violation has not been timely submitted to the Department.

2. The plan of correction for this violation has been disapproved.

3. The approved (or imposed) plan of correction for this violation has not been carried out.

(Exhibit 104)

———o———

TESTIMONY OF BORISLAV KRESOVIC—DIRECT EXAMINATION BY MR. HANDZEL:

Q. Up to that point in time, April 30, 1979, had you had a hearing on your appeal of the plans of correction?

A. No, sir.

Q. Had you had a hearing on your appeal of the notices of violation?

A. No, sir.

R. 219, p. 65.

———o———

STATE OF WISCONSIN
BEFORE THE WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES

In the Matter of the Petition of CAMEO CONVALESCENT CENTER, INC. Requesting a Fair Hearing Pursuant to §50.04(4) (e), Wis. Stats., and §§ 227.06 and 227.075, Wis. Stats., Involving a Dispute Between Said Petitioner and the Bureau of Quality Compliance, Department of Health and Social Services.	NOTICE OF APPEAL, REQUEST FOR FAIR HEARING, AND PETITION FOR DECLARATORY RULING Case No. DOHE-160-78

The Petitioner, through its attorneys, DeWitt, McAndrews & Sundby, S.C. and Robert M. Hesslink, Jr., by and for its Notice of Appeal, Request for Fair Hearing, and Petition for Declaratory Ruling, alleges as follows:

(1) Petitioner is a corporation organized under the laws of the State of Wisconsin and its principal place of business is 5790 South 27th Street, Milwaukee, Wisconsin 53221, whose principal business is providing shelter and care to the elderly citizens in the general Milwaukee area, and is a nursing home within the meaning of § 50.01(3), Wis. Stats.

(2) The Respondent, Bureau of Quality Compliance, Department of Health and Social Services, is a State agency within the meaning of § 227.01(1), Wis. Stats., and is charged with the authority and responsibility to regulate and inspect nursing homes in accordinance [sic] with Chapter 50, Wis. Stats., and to determine whether or not a

nursing home is to be placed on a suspension of referrals list in accordance with § 50.04(4)(d), Wis. Stats.

(3) On Wednesday, March 21, 1978, the Petitioner was served with a Notice of Placement on the Suspension of Referrals List, by certified mail, and said document was signed by Charles J. Fiss, Jr., Director of the Bureau of Quality Compliance. That notice alleged that Cameo Convalescent Center, Inc. would be placed on the monthly Suspension of Referrals List commencing on April 1, 1979, unless said Petitioner appealed that decision to the Enforcement Section-Appeals, One West Wilson Street, Room 421, Madison, Wisconsin 53702 within ten days of the receipt of said notice. And,

(4) The placement of the Petitioner on the Suspension of Referral List would be illegal, improper and an abuse of discretion.

WHEREFORE, the Petitioner requests the Department to:

(1) Conduct an administrative hearing, as a Class 2 proceeding.

(2) Adjudge the Notice to Place on Suspension of Referral List as illegal, invalid and an abuse of discretion.

(3) Remove any and all traces of said Notice of Placement on Suspension of Referral List on any and all files relating to the Petitioner within the Department or from files of others acting in concert with the Department, and return all copies of the Notice of Placement on Suspension of Referral List to the Petitioner for destruction. And,

(4) Enter an order requesting the Claims Board of the State of Wisconsin to provide payment for any and all

costs, disbursements and reasonble [sic] attorney fees in the necessary and proper defense of this Notice of Placement on Suspension of Referral List and requesting the Board to introduce the necessary legislation to pay said claim.

Respectfully submitted,

DeWitt, McAndrews & Sundby, S.C.

/s/ Robert M. Hesslink, Jr.
Attorneys for Petitioner

VERIFICATION

STATE OF WISCONSIN)
) ss.
County of Dane)

Personally came before me this — day of March, 1979, Robert M. Hesslink, Jr., and stated under oath that he is the attorney for the Petitioner in this action, that he has read the foregoing petition, and that he is personally aware of the facts alleged therein, and that the same is true to the best of his knowledge and belief, except as to matters alleged on information and belief as to which he believes these to be true.

Notary Public, State of Wisconsin
My Commission .....

Received
Bur. of Quality Compliance
Enforcement Section
Nadene R. Dreher 3/30/79
(Handwritten Notation)

(Exhibit 111)

———o———

BUREAU OF QUALITY COMPLIANCE
WEEKLY MEETING MINUTES

March 30, 1979

PRESENT: Chuck Fiss, Tom Van de Grift, Louis Remily, Jan Richardson, Peg Smelser, Milt Stearns, Diane Evensen

* * * *

PEG SMELSER

Suspension of Referrals List

Of the 19 facilities on the list, 6 have not appealed to date.

(Exhibit 114)

* * * *

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TESTIMONY OF MARGARET EISEMAN — DIRECT EXAMINATION BY MR. HESSLINK:

Q. Did you have occasions to observe people checking with Nadene Dreher as to the status of appeals during that first Suspension of Referrals List?

A. Yes.

Q. Did you have occasion to observe Peg Smelser checking on the status of appeals?

A. Yes.

Q. How frequently would she do that that you observed?

A. That I observed personally?

Q. Yes.

A. I—I don't know, at least every other day.

Q. And did you have occasion to observe David Siegel checking the status of appeals that had been filed for that first Suspension of Referrals List?

A. Yes.

Q. How often did you observe Mr. Siegel checking on the status of such appeals?

A. I can't tell you how often. It was of great interest to the staff in the Department and of one—I believe that there was a general and specific knowledge there.

Q. Did you have occasion to observe Mr. Vande Grift checking on the status of appeals?

A. Yes.

Q. And how frequently did you observe him checking on that status?

A. Again, often.

R. 216, pp. 62-63.

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TESTIMONY FROM DEPOSITION OF PEG SMELSER TAKEN JUNE 17 AND 21, 1982—MR. HANDZEL READING QUESTIONS POSED BY MR. HESSLINK:

Q. What other responsibilities, if any, did you have with respect to that list [Suspension of Referrals List]?

A. I would be responsible for the accuracy of the List, for seeing that it was printed and distributed in a timely fashion.

R. 215, pp. 307-308.

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April 4, 1979

April, 1979

SUSPENSION OF REFERRALS LIST

Attached is the April, 1979 Wisconsin nursing home Suspension of Referrals List, published by the Department of Health & Social Services, pursuant to §50.04(4)(d), Wisconsin Statutes. This list remains in effect until the publication of next month's list.

The list is divided into three parts:

I. *SUSPENSION OF ADMISSIONS.* Facilities on this list have outstanding serious or life-threatening violations. These *facilities* are *forbidden,* by law, *to admit any residents* until removed from this list by written notice from the department. In addition, their referral privileges are are [sic] restricted as in #2, below.

II. *SUSPENSION OF REFERRALS.* Facilities on this list have excessive outstanding violations of state codes and/or statutes. County 51.42 Boards, 51.437 Boards, and other county social service agencies *are forbidden,* by law, *to refer anyone* to facilities which are on this list. Other referral groups and agencies are strongly urged to use this list in making choices of facilities for referrals.

III. *REMOVAL OF RESTRICTIONS.* Facilities on this list appeared on List #1 or #2 during the previous month. By correcting violations, they either

a) have their admissions privileges reinstated, but continue to have referrals restricted; or

b) have had all restrictions removed.

In each section of the list, facilities are listed in alphabetical order *by county,* for the ease of those using the list.

In the event that a facility is removed from the *Suspension of Admissions* list during the effective period of this

list, it will receive written notice to that effect from the department.

If you do not wish to continue receiving this list monthly, or if you know of some person or agency who should be receiving this list but is not, please use the form on the back of this letter to notify me. If you have any questions about this list or its use, please contact the Enforcement Administration Section at (608) 266-8847.

Sincerely,

/s/ Charles J. Fiss, Jr., Director
Bureau of Quality Compliance (Emphasis in original)

WISCONSIN DEPARTMENT OF HEALTH & SOCIAL SERVICES SUSPENSIONS LIST
APRIL, 1979

I. SUSPENSION OF ADMISSIONS LIST

Five facilities have appealed placement on the Suspension of Admissions List.

II. SUSPENSION OF REFERRALS LIST

Facilities on this list are prohibited by law from receiving referrals from county social service boards, 51.42 Boards, or 51.437 Boards, until those facilities appear on list III below, the Removal of Restrictions List.

Twelve facilities have appealed placement on the Suspension of Referrals List.

CO./FAC. NAME	CTY./TOWN	LIC#	LIC. NAME
Dane County			
Brickson's Nursing Home	Stoughton	2047	Duane Brickson
Door County			
Door County Mem. Hosp. ECF & N.H.	Sturgeon Bay	2196	Door County Memorial Hosp. Corporation

Milwaukee County		
Cameo Convalescent Center	Milwaukee	2230 Cameo Convalescent Center, Inc.

III. REMOVAL OF RESTRICTIONS LIST

Because this is the first publication of the Suspension of Referrals List, there are no removals from the list to report. However, in future months, facilities listed in this area will be those which appeared on the previous month's suspensions lists and have been removed from one and/or the other of the lists. Those which are designated with an asterick (*) will be those which have had their admissions privileges reinstated, but remain on the Suspension of Referrals List.

(Exhibit 121)

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February 26, 1979

Dr. Dragomir Kresovic, Administrator
Cameo Convalescent Center
5790 South 27th Street
Milwaukee, Wisconsin 53221

Dear Mr. Kresovic:

* * * *

When a facility receives notice that it has been removed from the *Suspension of Admissions List,* it may begin admitting new residents that day. The *Suspension of Referrals List,* however, will be in force from the publication date until publication of the next list, and referral agencies may resume referrals to a facility only when they have received a list indicating that the facility has been removed from the Suspension of Referrals List.

* * * *

Sincerely yours,

/s/ Charles J. Fiss, Jr., Director
Bureau of Quality Compliance

(Exhibit 82)

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May 2, 1979

SUSPENSION OF REFERRALS LIST

Attached is the May, 1979 Wisconsin Nursing Home Suspension of Referrals List, published by the Department of Health and Social Services, pursuant to §50.04(4)(d), Wisconsin Statutes. This list remains in effect until the publication of next month's list.

The list is divided into three parts:

I. *Suspension of Admissions.* Facilities on this list have outstanding serious or life-threatening violations. These facilities are *forbidden,* by law, *to admit any residents* until removed from this list by written notice from the department. In addition, their referral privileges are restricted as in #2, below.

II. *Suspension of Referrals.* Facilities on this list have excessive outstanding violations of state codes and/or statutes. County 51.42 Boards, 51.437 Boards, and other county social service agencies *are forbidden,* by law, *to refer anyone* to facilities which are on this list. Other referral groups and agencies are strongly urged to use this list in making choices of facilities for referrals.

III. *Removal of Restrictions.* Facilities on this list appeared on list #1 or #2 during the previous month. By correcting violations, they either:

a) have their admissions privileges reinstated, but continue to have referrals restricted; or

b) have had all restrictions removed.

In each section of the list, facilities are listed in alphabetical order *by county,* for the ease of those using the list.

In the event that a facility is removed from the *Suspension of Admissions* list during the effective period of this list, it will receive written notice to that effect from the department.

If you do not wish to continue receiving this list monthly, or if you know of some person or agency who should be receiving this list but is not, please use the form on the back of this letter to notify me. If you have any questions about this list or its use, please contact the Enforcement Administration Section at (608) 266-8847.

Sincerely,
/s/ Charles J. Fiss, Jr.

Director
Bureau of Quality Compliance (Emphasis in original)

WISCONSIN DEPARTMENT OF HEALTH & SOCIAL SERVICES SUSPENSIONS LISTS

MAY, 1979

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III. REMOVAL OF RESTRICTIONS LIST

There are no removals from the list to report. Facilities listed in this area are those which have appeared on the previous month's suspensions list and have been removed from one and/or the other of the lists. Those which are designated with an asterisk (*) are those which have had their admissions privileges reinstated, but remain on the Suspension of Referrals List.

(Exhibit 148)

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 22 (LIBERTY; DUE PROCESS)

[As stated before,] The Fourteenth Amendment to the Federal Constitution provides that no State shall deprive any person of his liberty without due process of law. The

"liberty" of the individual, which the Federal Constitution thus secures and protects, is not an absolute and unqualified freedom or privilege to do as one pleases at all times and under all circumstances; but is always subject to reasonable restraints, including of course such restraints as are imposed by law.

The plaintiff in this case, in common with the defendants and all other persons living under the protection of our Constitution, had the legal right at all times not to be deprived, without due process of law, of any liberty secured or protected to him by the Constitution or laws of the United States.

To be deprived of liberty "without due process of law" means to be deprived of liberty without authority of the law. Before the jury can determine, then, whether or not the plaintiff was deprived by the defendants of any of his liberty under the Federal Constitution, "without due process of law", the jury must first determine, from a preponderance of the evidence in the case, whether the defendants knowingly did the acts alleged and, if so, whether, under the circumstances shown by the evidence in the case, the defendants acted within or without the bounds of their lawful authority under State law.

For if the defendants acted within the limits of their lawful authority under State law, then the defendants could not have deprived the plaintiff of any liberty "without due process of law", since the Court finds and instructs you that the State law applicable in this case meets the requirements of the Federal Constitution.

Federal Jury Practice and Instructions, Devitt & Blackmar (3rd Ed.) sec. 92.11, with deletions of paragraphs relating to prisoner litigation only.

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 23 (LIBERTY; REPUTATION)

The plaintiffs complain of injury to their professional and business reputations. The Constitution, however, does not protect against damage to reputation unless the damage to reputation also works to deny the plaintiffs of a right or status previously recognized by state law. In other words, it is not enough for plaintiffs to show their reputations have been injured by the defendants. They must show that the damage to their reputations also altered or extinguished a right or status previously recognized by state law.

The Supreme Court has given three examples of what it means to alter or extinguish a right or status previously recognized by state law. One of the examples is the suspension of a student from school based upon charges of misconduct. Another is the revocation of a driver's license. And a third is the revocation of parole.

Paul v. Davis, 424 U.S. 693 (1976).

Margoles v. Tormey, 643 F.2d 1292 (7th Cir. 1981).

Terket v. Lund, 623 F.2d 29, 31 n. 1 (7th Cir. 1980).

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 25 (PROPERTY)

Plaintiffs allege that the defendants deprived them of their property without due process of law. In order to make a legal judgment about this claim, you will be asked to answer certain questions.

One of the questions asked is whether one or more of the defendants deprived one or more of the plaintiffs of property. Under the law, property is more than land, automobiles, and other possessions. It includes benefits which state law gives to its citizens.* So in answering whether the plaintiffs were deprived of property, you must consider whether plaintiffs lost some possessions or rights granted by state law.

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*Board of Regents v. Roth, 408 U.S. 564, 576-78 (1972).

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 35 (DEFINITION OF PROXIMATE CAUSE)

An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

Federal Jury Practice and Instructions, Devitt & Blackmar (3rd ed.) sec. 80.18.